

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

December 16, 2008

The Rhode Island Ethics Commission held its 22nd meeting of 2008 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, December 16, 2008, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

**Barbara R. Binder, Chair Deborah M. Cerullo SSND
Ross Cheit, Vice Chair Edward A. Magro
Frederick K. Butler**

Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Mancini and Steven Branch.

At 9:03 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held on December 2, 2008. Upon motion made and duly seconded, it was

unanimously

VOTED: To approve minutes of the Open Session held on December 2, 2008.

The next order of business was a discussion regarding Advisory Opinion No. 2008-23, previously issued to Robert La Fazia. Staff Attorney DeVault explained that upon recent review of the opinion, which was prompted by pending requests based upon similar facts, it was determined that the issued opinion did not address the application of Regulation 5014 to the facts presented. She suggested that the Staff draft an amended opinion for consideration by the Commission at its next meeting. In response to Commissioner Cheit, she indicated that she has spoken with Mr. La Fazia, who represented that he has not engaged in the subject conduct and has no intention of doing so in the future. Commissioner Cheit voiced his support for consideration of an amended opinion. In response to Commissioner Butler, Staff Attorney DeVault clarified that there is no prejudice to Mr. La Fazia, who would have been protected by the issued opinion if he had engaged in the subject auto repair activities.

The next order of business was that of advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Brian G. Coogan, a newly elected

member of the East Providence City Council. Staff Attorney DeVault presented the Commission Staff recommendation. The East Providence City Solicitor, James A. Briden, was present for the Petitioner. Upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Brian G. Coogan, a newly elected member of the East Providence City Council.

The next advisory opinion was that of John L. Tattrie, a Warren Planning Board member. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present. Staff Attorney DeVault noted two factual corrections concerning the Petitioner's spouse being sworn in on November 17th and the Petitioner's father serving as Vice President, respectively. The Petitioner represented that the contract has not yet been awarded. He noted the uncertain status of the Warren Sewer Commission and questioned whether the parameters of the opinion would change should the decision to award the contract ultimately go to the Council or Town Manager. Staff Attorney DeVault referenced a footnote in the draft opinion regarding the Sewer Commission's status, and she stated that the draft recommendation would still apply given that the Petitioner's spouse's position is not going to change.

In response to Commissioner Cerullo, the Petitioner explained that he responded to a request for snow removal services that had been

advertised in the local weekly newspaper. He represented that he is one of two bidders on the contract and that he has not previously bid on such services. In further response to Commissioner Cerullo, the Petitioner stated that the bids were opened publicly in the Town Clerk's office, logged in by the Clerk and they are available as public records. In response to Commissioner Cheit, the Petitioner indicated that Brian Remy and another individual informed him that he could not bid on the contract. He noted that he had not spoken with the Town Solicitor about the issue. He also inquired whether he would be able to bid on work for the Town Water Authority. Chair Binder noted that such an inquiry should be directed to Staff. In response to Commissioner Butler, Staff Attorney DeVault clarified that the opinion only addresses the Petitioner's conduct and does not provide his spouse with any safe harbor. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, John L. Tattrie, a Warren Planning Board member.

The next advisory opinion was that of Diane S. Nobles, Ph.D., Vice Chairperson of the Narragansett School Committee. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present. Commissioner Cerullo asked the Petitioner to describe the nature of her relationship with her local and the local with which she would be negotiating, particularly with regard to any

common elements. The Petitioner represented that she is an agency member of the Professional Staff Association, as required due to her position at the Community College. She stated that the only commonality with the Narragansett local is within the top echelons at the state board level. She noted that negotiations are well under way and if she were to take her place on the subcommittee, it would likely only last for two meetings.

In response to Commissioner Cheit, the Petitioner stated that three of the five subcommittee members have direct NEA relationships but her relationship is at a removed level. In further response, she informed that the other members are aware of her indirect relationship. Upon motion made by Commissioner Magro and duly seconded by Commissioner Butler to approve the draft opinion, there was further discussion.

Commissioner Cerullo expressed her discomfort, observing that both locals are run by the same people. Chair Binder stated that she, too, is uncomfortable with the situation. Staff Attorney Leyden distinguished the prior Jamestown opinion cited to in the draft, which had involved an appearance by the local's business agent. Chair Binder indicated the situation raises an appearance of impropriety. Commissioner Cheit stated that, although he agrees with the other members' discomfort, the Code is clear. Commissioner Butler inquired whether the Petitioner has any reservations about being able to carry out her responsibilities. The Petitioner stated that, although

it seems to present a conflict, she has no qualms about serving. In response to Commissioner Cerullo, the Petitioner represented that she would be able to use her independent judgment. Commissioner Cerullo indicated that she is in agreement with Commissioner Cheit. Upon the original motion made by Commission Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Diane S. Nobles, Ph.D., Vice Chairperson of the Narragansett School Committee.

The next advisory opinion was that of K. Joseph Shekarchi, Esq., a member of the Coastal Resources Management Council. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner Cheit, the Petitioner advised that the shareholder at issue is Alfred Carpionato. Commissioner Cheit voiced his belief that the shareholder's name should be in the record. Upon motion made by Commissioner Butler and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to K. Joseph Shekarchi, Esq., a member of the Coastal Resources Management Council.

The next advisory opinion was that of William L. Bernstein, a Probate Court Judge for the Town of Glocester. Staff Attorney Leyden

presented the Commission Staff recommendation. She represented that the Petitioner was scheduled to be in District Court this morning and would be unable to attend. Upon motion made by Commissioner Magro and duly seconded by Commission Cheit, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to William L. Bernstein, a Probate Court Judge for the Town of Glocester.

The next advisory opinion was that of Shelley Cortese, an Assistant Administrator of Probation and Parole for the Rhode Island Department of Corrections. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner Cerullo, the Petitioner stated that she would be receiving confidential patient information in her clinical role.

She indicated that she would be doing the work with one or two others in a hospital or police setting and, therefore, would be able to have another handle that patient if he or she were a parolee or probationer. Commissioner Cerullo asked whether, in the event a parolee or probationer were before her and she had confidential information that the individual was in violation, would it conflict with her job description to assist in the surrender of such individual to the courts.

The Petitioner replied that she is bound by HIPPA as a clinician, but she noted that she would warn if she had a duty and there were a

situation involving an imminent public safety risk. Commissioner Cerullo expressed her concern that the Petitioner's job is to assist with the surrender of such individuals. Chair Binder commented that it almost presents a reverse conflict because it is in the context of the Petitioner's private employment that she would obtain such information. Commissioner Cheit inquired what would happen if she obtained information that such a patient had suffered an overdose. The Petitioner clarified that an overdose would not constitute an automatic violation of one's probation or parole, given the goal of rehabilitation. Commissioner Magro asked if it would not be something the parole officer would want to know about.

Chair Binder inquired how the Petitioner could know whether someone were in the system, given that it involves over 145,000 individuals. The Petitioner stated that she could not know whether an individual were in the system unless they were asked upon presentation. Commissioner Cerullo pressed as to whether a parole or probation officer would want to know that the individual was at the hospital. The Petitioner stated that it is not her job to tell them that in her private employment as a clinician. Commissioner Cerullo again asked whether a parole or probation officer would inquire as to what brought the patient to the hospital. The Petitioner stated that they would want to know.

In response to Commissioner Butler, the Petitioner indicated that she would not be involved in the investigation of what brought the patient

there in her capacity as an administrator. In response to Commissioner Cheit, she stated that she does see case files. Commissioner Cheit expressed that he sees the potential for the two roles to be put in conflict. Commissioner Cerullo echoed that concern. The Petitioner represented that she would not be assisting with the surrender of an individual on state time. She noted that her superiors are aware of the situation and have not raised any concern regarding a conflict.

In response to Chair Binder, the Petitioner inquired how she would have an extra duty when she is not on state time. Commissioner Cerullo stated that her concern relates to the obligation of confidentiality she would have in her private work. Commissioner Cheit noted that she would be prohibited from disclosure. Staff Attorney Leyden stated her understanding that the Petitioner is in an administrative or managerial role and her duties would be far removed. The Petitioner stated that she is uncertain whether the assessment asks whether the patient is on probation or parole. Staff Attorney Leyden noted that the Petitioner could refuse to handle a case if she were aware of the patient's status.

In response to Commissioner Cheit, the Petitioner indicated that she would only see a case file perhaps two times yearly. She made an affirmative representation that she does not need to see any case files, as another administrator could handle them. Commissioner Cerullo noted that she would still have concerns as to reasonable

foreseeability because the Petitioner will get information that her agency would want to know about, yet she cannot disclose it. Commissioner Cheit stated his belief that it is more remote than it is reasonably foreseeable. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Magro, it was

VOTED: To issue an advisory opinion, as amended, to Shelley Cortese, an Assistant Administrator of Probation and Parole for the Rhode Island Department of Corrections.

AYES: Frederick K. Butler, Edward A. Magro and Ross Cheit.

NOES: Deborah M. Cerullo SSND and Barbara R. Binder.

No opinion issued due to a lack of five affirmative votes.

The next advisory opinion was that of Daniel Gendron, a member of the Woonsocket Zoning Board of Review. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Magro and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Daniel Gendron, a member of the Woonsocket Zoning Board of Review.

At approximately 10:10 a.m., upon motion made and duly seconded, it

was unanimously,

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

**a.) Motion to approve minutes of Executive Session held on
December 2, 2008.**

**b.) William V. Irons v. Rhode Island Ethics Commission,
Superior Court C.A. No. 07-6666**

**c.) Jason E. Ferrell v. Frank Caprio, Jr., et al.,
U.S. District Court C.A. No.08-378S**

d.) Motion to return to Open Session.

The Commission returned to Open Session at approximately 10:17 a.m. The next order of business was a motion to seal minutes of the Executive Session held on December 16, 2008. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Butler, it was unanimously

VOTED: To seal minutes of the Executive Session held on December 16, 2008.

Chair Binder reported that the Commission approved minutes of the

Executive Session held on December 2, 2008 and received updates on the litigation matters of William V. Irons v. Rhode Island Ethics Commission and Jason E. Ferrell v. Frank Caprio, Jr.

The next order of business was the Director's Report. Executive Director Willever advised that there are seven advisory opinions and five complaints pending, including three non-filing complaints. He informed that one formal APRA request was granted since the last meeting. He reported that the Staff is still spending a significant amount of time on budget and personnel issues. He noted that for next year the Commission is projecting that there will be no funding for out-of-state travel and a laptop computer. He indicated that the agency has retained all 12 FTE's, although one position remains vacant and slots are not being filled as people leave within state government. Director Willever reported that the Commission Staff hosted an international group from the Defense Institute of Legal Studies on December 12th, which represented officials from fourteen countries. He thanked Commissioner Cheit for his participation.

The next order of business was New Business. Chair Binder recognized Christine Lopes, the outgoing Executive Director of Common Cause, and thanked her for her thoughtful analysis of the issues. Staff Attorney Gramitt provided a brief analysis of Arnold v. Lebel, 941 A.2d 813 (R.I. 2007), which discusses the types of ex parte communication a hearing officer may have with agency staff. Staff Attorney Gramitt noted that the Commission is in full compliance with

the ex parte rules under the APA. He noted the following key holdings of the decision: 1) there can be no ex parte communication with anyone about contested or material adjudicatory facts or opinions regarding the merits of a pending matter; 2) it is permissible to have general communication with staff on contested matters regarding procedure and scheduling; 3) a hearing officer must notice the parties before hearing if he consults a documentary source or person regarding the merits of an appeal, so that the parties have the opportunity to contest and cross-examine; and 4) all evidence must be on the record.

Commissioner Cheit complimented the Staff on the new website. Commissioner Cerullo suggested that the Commission add to its list of potential regulatory matters the issue presented today regarding local unions who are members of an umbrella organization. Chair Binder also suggested that the Commission take a look at the language in Regulation 5014 which addresses elected municipal officials and not those who are appointed.

At approximately 10:30 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Butler, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch
Secretary